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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

R.H. RISON, ET AL., PETITIONERS

v.

JOHN DEMJANJUK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether attorneys for the government who acted in good faith and without a subjective intent to defraud nevertheless committed fraud upon the court by failing to disclose during respondent's denaturalization and extradition proceedings information that they did not consider exculpatory.

PARTIES TO THE PROCEEDINGS

R.H. Rison is presently the Warden at the Federal Prison Medical Facility at Springfield, Missouri. In 1985, when respondent filed his habeas corpus petition seeking relief from extradition, Joseph Petrovsky was the warden of the facility, and the decisions below accordingly bear his name. The remaining defendants in respondent's habeas corpus action were the Attorney General, the Secretary of State, and the United States District Court for the Northern District of Ohio. Because we do not represent the United States District Court, that entity technically is a respondent in this Court. For convenience, the petition nevertheless refers to Demjanjuk as respondent in the singular.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of R.H. Rison, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals vacating its 1985 judgment allowing respondent's extradition (App. 1a-86a) is reported at 10 F.3d 338. The report of the special master (App. 87a-305a) is not reported. A related opinion of the court of appeals allowing respondent's extradition is reported at 776 F.2d 571. Related opinions of the district court finding that respondent was subject to extradition and denying his petition for a writ of habeas corpus seeking relief from extradition are reported at 612 F. Supp. 544 and 571, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on February 24, 1994. App. 307a-308a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 60(b), Fed. R. Civ. P., provides in part as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party * * *. The motion shall be made within a reasonable time, and for reaso[n] * * * (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * * This rule does not limit the power of a court * * * to set aside a judgment for fraud upon the court.

STATEMENT

1. Respondent was born in 1920 in what was then the Ukrainian Republic of the Soviet Union. In 1940, he was conscripted into the Soviet Army; sometime in the next few years, he was captured by the Germans. By July of 1942, respondent, like other Soviet soldiers captured by the Germans, had been transferred to an SS training camp in Trawniki, Poland. That camp was established to carry out "Aktion Reinhard," the Nazi plan for the extermination of the Jews from countries under Nazi control. The Trawniki camp trained the Soviet prisoners of war to

serve as guards at death camps set up at Belzec, Sobibor, and Treblinka and to round up and transport Jews from the ghettoes to which they had been confined. In 1952, respondent was admitted to the United States as a lawful permanent resident after executing documents stating that he had worked as a farmer in Sobibor from 1934 until 1943; the documents that respondent executed omitted any reference to his service in the SS. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362, 1363-1365 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982); Gov't C.A. App. 323-332 (reproducing documents executed by respondent in connection with his entry to this country).

In the 1980s, a federal district court denaturalized respondent and the Attorney General ordered his deportation based on respondent's service during World War II as an SS guard at the camps in Treblinka and Trawniki and the misrepresentations he made to immigration officials when he entered the United States. At the denaturalization trial, the government introduced into evidence an original German war document bearing respondent's picture and indicating his service at Trawniki. After considering respondent's objections, as well as expert testimony, the court concluded that the document was an authentic identification card issued to respondent at Trawniki.[1] *United States* v. *Demjanjuk*, 518 F. Supp. at 1365-1369 (denaturalization); *In re Demjanjuk*, No. A8 237 417 (Executive Office for Immigration Review May 23, 1984)

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[1] Relying principally on a notation on the Trawniki identification card indicating that respondent had been posted to the Sobibor death camp in March of 1943, the denaturalization complaint also alleged that respondent had served as an SS guard at that camp. The district court had no occasion to consider that allegation because it found other adequate grounds for denaturalization, as explained in the text. 518 F. Supp. at 1376 n.31.

(*reproduced in* Gov't C.A. App. 344-358), appeal dismissed, No. A8 237 417 (BIA Feb. 14, 1985) (*reproduced in* Gov't C.A. App. 359-374), aff'd, *United States* v. *Demjanjuk*, 767 F.2d 922 (6th Cir.) (Table), cert. denied, 474 U.S. 1034 (1985).

2. In November 1983, the State of Israel requested that the United States extradite respondent for trial on charges that he committed war crimes involving the murder of civilians at the Treblinka death camp, in violation of Israel's Nazi and Nazi Collaborators (Punishment) Law, 5710-1950. See Gov't C.A. App. 389-404 (reproducing Israel's request for extradition). Israel supported its request with the affidavits and testimony of six Treblinka survivors who identified respondent's photograph as depicting a Ukrainian guard named "Ivan" who operated the gas chambers. Pursuant to its obligation under the Convention on Extradition, Dec. 10, 1962, U.S.-Israel, 14 U.S.T. 1707, the government filed a complaint in the Northern District of Ohio seeking a warrant authorizing respondent's extradition to Israel. On April 15, 1985, the district court held that respondent was subject to extradition because the survivor affidavits established probable cause to believe that respondent had murdered civilians at Treblinka in 1942 and 1943. 612 F. Supp. 544.

The district court thereafter denied respondent's petition for a writ of habeas corpus, which sought relief from extradition. 612 F. Supp. 571 (1985). The court of appeals affirmed. 776 F.2d 571 (1985). Noting that "[t]he scope of review in habeas corpus following an extradition order is quite narrow," the court quoted the general principles articulated by Justice Holmes in *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925), which confine review of the extradition order to the question "whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." 776 F.2d at 576. After

reviewing the "sworn testimony by affidavits from six witnesses who were at Treblinka in 1942 and 1943 who identified [respondent]," the court concluded: "Surely the evidence in this case satisfied this lenient standard." *Ibid.* This Court denied certiorari, 475 U.S. 1016 (1986), and respondent thereafter was extradited to Israel.

In April 1988, a three-judge panel in Israel convicted respondent of war crimes after finding beyond a reasonable doubt that respondent was the Treblinka gas chamber operator known as "Ivan the Terrible." *Israel* v. *Demjanjuk,* Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988).[2] While respondent's appeal to the Supreme Court of Israel was pending, Israeli prosecutors obtained from the former Soviet Union interrogation records of individuals who identified a photograph of an individual named Ivan Marchenko as the photograph of a gas chamber operator at Treblinka; one guard stated that Ivan Marchenko had been known to the Jewish prisoners as "Ivan the Terrible." *Demjanjuk* v. *Israel,* Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), slip op. 388, ¶ 453 (see Gov't C.A. Reh. App. C11).[3]

3. In 1992, based on press reports that the Department of Justice had possessed information relating to Mar-

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[2] At pages 431-645 of its appendix in the court of appeals, the government reproduced an English translation of the verdict in that case, which was published in 1991 as *The Demjanjuk Trial* by the Israel Bar Publishing House in Tel Aviv.

[3] Because we have not yet received a complete official English translation of the opinion of the Supreme Court of Israel in the *Demjanjuk* case, this petition cites directly to the paperbound version of the original opinion, which was issued by the court in Hebrew. Appendix C to the government's petition for rehearing in the court of appeals provides an English translation of portions of the opinion. This certiorari petition provides cross-references to that translation for the convenience of the Court.

chenko that was not disclosed to respondent at the time of the extradition, the court of appeals reopened its extradition judgment and appointed a special master, United States District Judge Thomas A. Wiseman, Jr., to determine whether government attorneys committed fraud upon the court in the proceedings against respondent. App. 43a-45a, 46a-49a, 306a.

4. Over a period of about six months, the special master heard the live testimony of six attorneys, accepted the deposition testimony of several other witnesses, and reviewed over 300 exhibits. App. 93a-94a. On June 30, 1993, the special master issued a 210-page report in which he concluded that the case should not be reopened. *Id.* at 87a-305a.

a. The special master rejected each of respondent's allegations of fraud. App. 250a-258a. The special master's findings with respect to three specific allegations made by respondent are important to this petition: those regarding the so-called Fedorenko protocols, a Polish Main Commission list of Treblinka guards, and the identification testimony of Otto Horn.

i. The special master explained that in 1978 the United States government received materials from the Soviet Union in response to a request for information regarding Treblinka guard Feodor Fedorenko. Those materials—generally referred to as the Fedorenko protocols—included an excerpt of a 1945 record of interrogation of a Treblinka guard named Pavel Leleko (who had been executed in 1945) and a 1978 statement of another guard named Nikolai Malagon. App. 119a-123a (special master's factual discussion of acquisition of Fedorenko protocols). Leleko stated that the gas chambers were operated by

"Marchenko and Nikolay," whom Leleko described as "motorists." *Id.* at 58a-59a (appendix to opinion of court of appeals reproducing text of statement). Malagon stated that a guard named "Marchenko,Nikolay [*sic*]" worked near the "diesel engines by the gas chambers." Gov't C.A. App. 149 (text of statement).[4]

After reviewing those statements, the special master concluded that the government's conduct regarding them was not improper. The special master noted that neither statement mentioned "Ivan the Terrible" or any guard named Ivan, and also pointed out that the statements did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names [Marchenko and Nikolay] with either Ivan the Terrible or Ivan Demjanjuk." App. 259a. Most important, based on the testimony and contemporaneous notes of the two government attorneys who had read the Fedorenko protocols, the special master concluded that those attorneys had not considered the statements to be exculpatory. *Id.* at 123a, 126a-127a, 159a-167a. Instead, following receipt of a second statement by Malagon, in which Malagon indicated that there were two gas chamber "engine operator[s]" at Treblinka named Nikolay Marchenko and "Ivan Demedyuk or Ivan Dem'yanyuk" (Gov't C.A. App. 214-216, 850 (text of subsequent

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[4] The comma between the names "Marchenko" and "Nikolay" appears to have been introduced by the translator, because it does not appear in the original Russian. Although the statement is reproduced as an appendix to the opinion of the court of appeals (App. 60a-64a), this petition cites to the photocopy included in our court of appeals appendix because the printed version attached to the opinion of the court of appeals has different spacing than the original English translation available to the government attorneys.

Malagon statement)[5]), the attorneys concluded that Marchenko's first name was Nikolay. App. 165a-167a.

ii. The special master also discussed another document that apparently refers to Marchenko, a 1975 article about Treblinka published by the Polish Main Commission for the Investigation of Hitlerite Crimes. App. 128a-132a. That article listed 43 "known" Treblinka guards, including one "Marczenko Iwan"; the article provided no additional information about that guard. See Gov't C.A. App. 282-283 (relevant portion of article). The special master found that the government had provided respondent with an English translation of that article in August 1982, more than three years before respondent's extradition to Israel. App. 129a-130a, 199a-200a.

iii. The special master also rejected respondent's contention that the government committed fraud in presenting the testimony of former SS guard Otto Horn at the denaturalization trial. App. 140a-154a, 250a-251a. In a

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[5] The court of appeals reprinted both the first and second statements as appendices to its opinion, App. 60a-67a. This petition cites for clarity to the government's appendix in the court of appeals, which contained both those items (Gov't C.A. App. 144-156, 214-216), and a later partial version (Gov't C.A. App. 850) correcting the translation of the second statement.

The second statement was produced when Soviet officials reinterviewed Malagon in October of 1979. In that interview, Malagon stated that he had known a Treblinka guard named "Ivan Demedyuk or Ivan Dem'yanyuk" who began as a cook and later was transferred to a position as an engine operator at the gas chambers. Gov't C.A. App. 214-216, 850. Although Malagon indicated in that statement that he would be able to identify a photograph of the man named "Ivan Demedyuk," he was unable to identify respondent's photograph. The government disclosed Malagon's name and address to respondent before the denaturalization trial in response to an interrogatory requesting the names of persons who had failed to identify respondent's photograph. App. 253a, 301a.

November 1979 interview in his Berlin apartment, Horn told government attorney Norman Moscowitz that a Ukrainian named "Ivan" had operated the gas chambers at Treblinka. To avoid becoming a witness to a possible identification, Moscowitz turned his back while investigators presented two spreads containing respondent's photographs. After the interview, the investigators told Moscowitz that Horn had made a "good, valid identification" of respondent; the investigators thereafter confirmed the positive identification in reports to their supervisor. *Id.* at 140a-143a.

Horn repeated the identification in February 1980 in a deposition, but Horn described the photospread procedure somewhat differently than the investigators described it in their reports. App. 144a-146a. Moscowitz did not disclose any problem with the identification proceeding to respondent before the denaturalization trial; he explained to the special master that he was not aware of the discrepancy because he did not read the reports until long after the denaturalization trial. *Id.* at 147a. The special master accepted that explanation, noting that it was supported by "the unanimous testimony in these proceedings," and that "there is no substantial evidence in the record to gainsay the crux of Mr. Moscowitz's testimony." *Id.* at 147a, 148a; see *id.* at 251a ("I find that Norman Moscowitz in fact did not know that Otto Horn's identification of [respondent's] photographs proceeded in the manner described in the [investigators'] reports."). The special master suggested that Moscowitz may have "felt that his conversations [on the day of the identification] with [the investigators] provided him with ample information on the way in which the [photo identification] was conducted." *Id.* at 149a. Accordingly, the special master concluded that respondent's contention that Moscowitz

committed fraud when he did not disclose the circumstances of the identification was "without merit." *Id.* at 251a.

b. In addition to rejecting each of respondent's particularized allegations of fraud, the special master evaluated the conduct of the government attorneys who had participated in the extradition proceedings. The special master stated that they had "cooperated fully in this investigation," that "they testified truthfully, and that they are now, and were then, principled, albeit fallible." App. 263a. Similarly, he found that the attorneys possessed "good-faith beliefs, based on credible evidence [at the relevant times], * * * that [respondent] had served at both Treblinka and [the] Sobibor [death camps]," *id.* at 189a-190a; that they "had a good faith belief that they had met their discovery obligations," *id.* at 258a; and that they "did not believe that they possessed and withheld exculpatory information," *id.* at 243a.[6] The special master concluded (*id.* at 263a):

> [The government attorneys] acted in good faith. They did not intend to violate the Rules or their ethical obligations. They were not reckless; they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what

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[6] In the portion of his report describing the government's response to respondent's discovery requests, the special master stated that the government attorneys at one point were "playing hardball" by narrowly construing one of respondent's interrogatories. App. 234a. The special master expressly found, however, that the "attorneys acted in good faith in [interpreting the interrogatory]." *Ibid.*; see 518 F. Supp. at 1385 n.52 (denaturalization court did "not ascribe any sinister motivation" to government's construction of fourth set of interrogatories).

> we may now perceive to be the truth, they were not wilfully blind.

Because the special master found no fraud and no other basis for reopening the extradition proceedings, he concluded his report by recommending that "the case of *Demjanjuk v. Petrovsky, et al.* be closed." *Id.* at 266a.

5. In July 1993, the Supreme Court of Israel issued its decision reviewing respondent's conviction as a Nazi collaborator. The court applied a strict standard under which it could uphold the conviction only if the only rational conclusion the record would support was that respondent was the gas chamber operator known as Ivan the Terrible of Treblinka. *Demjanjuk* v. *Israel,* slip op. 391, ¶ 456 (see Gov't C.A. Reh. App. C16).[7] After reviewing evidence that an individual named Ivan Marchenko might have been a gas chamber operator at Treblinka, the court concluded that there was a reasonable doubt that respondent was the individual who had been known as Ivan the Terrible, and accordingly overturned his conviction. Slip. op. 392, ¶¶ 456-457 (see Gov't C.A. Reh. App. C18-C20).

The Supreme Court of Israel stressed that, in its view, none of the new evidence derogated from the evidence that proved that respondent had served as an SS guard at Trawniki, service that the court characterized as an integral part of the German extermination machine. *Demjanjuk* v. *Israel,* slip op. 393, ¶¶ 458-459 (see Gov't C.A. Reh. App. C20-C21). The court also found that other new

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[7] That standard is much stricter than the standard for reviewing the adequacy of the record to support factual conclusions in this country. See *Jackson* v. *Virginia,* 443 U.S. 307, 319 (1979) (critical question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

evidence, not available at the time of respondent's extradition or trial, confirmed respondent's service in the SS and completely vitiated his claim that his Trawniki identification card was a forgery. Slip. op. 383, ¶ 447 (see Gov't C.A. Reh. App. C1-C2). Furthermore, the court concluded that respondent's extradition had been lawful, because the survivor identifications on which the extradition was based had provided an adequate basis for the extradition decision.[8] Slip. op. 404 (see Gov't C.A. Reh. App. C40).

6. In November 1993, the court of appeals vacated its 1985 judgment and the judgment of the district court allowing respondent's extradition. App. 1a-86a.[9] The court started by summarizing the background of the case and the special master's report, including the special master's findings that the attorneys for the government "acted in good faith, * * * did not intend to violate the Rules or their ethical obligations[,] * * * did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance." *Id.* at 25a (quoting *id.* at 263a). The court concluded that it "cannot find [those findings] clearly erroneous." *Id.* at 25a.

The court did, however, overturn the special master's conclusion that the attorneys were not reckless. App.

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[8] The Supreme Court of Israel also affirmed the trial court's finding that the testimonies of the identification witnesses, including Otto Horn, were reliable. See *Demjanjuk* v. *Israel*, slip op. 386-388, ¶¶ 450-452 (see Gov't C.A. Reh. App. C6-C10). The specific discussion of the Horn identification appears at slip op. 387 (¶ 451(beth)).

[9] On August 6, 1993, after the Supreme Court of Israel announced its decision, the court of appeals issued an order granting interim relief that prohibited the United States government from preventing respondent's return to the United States. See Order, No. 85-3435 (6th Cir. Aug. 6, 1993).

25a-31a. It reasoned that recklessness "should be determined from an objective examination of the actions of the parties in a particular set of circumstances." *Id.* at 26a. The court concluded that, evaluated against that objective standard, the government attorneys acted recklessly on three occasions: (1) in failing to produce the Fedorenko protocols; (2) in delaying production of the Polish Main Commission list of Treblinka guards[10]; and (3) in failing to read and produce investigative reports describing the identification procedures followed with Otto Horn. *Id.* at 27a-31a.

The court of appeals then considered whether a judgment should be reopened for fraud upon the court based solely on an objective finding of recklessness, without a subjective intent to commit fraud. App. 32a-33a. The court acknowledged that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court," but nevertheless concluded that "subjective intent to commit fraud * * * is not required in a case such as this. Reckless disregard for the truth is sufficient." *Id.* at 33a.[11]

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[10] The opinion of the court of appeals states (App. 28a) that the list was not furnished until 1992. That statement is incorrect; the list was furnished to respondent in 1982, as respondent expressly acknowledged on page 5 of the chart appended to respondent's "First Brief for Petitioner," filed in the court of appeals on July 27, 1992. The court of appeals may have been aware of the correct date, see App. 30a (statement of court of appeals that list should "have been furnished in 1979, * * * not three years later"), but it declined to correct the erroneous reference to 1992 even after the government specifically called the error to the panel's attention in its petition for rehearing, see Gov't C.A. Pet. for Reh. 15 & n.9. The court also declined to correct its erroneous statement (App. 11a) that the list included "more than 70" names. As review of the list demonstrates, there were only 43 names on the list. See Gov't C.A. App. 282 (reproducing list); Gov't C.A. Pet. for Reh. 14 (noting panel's error).

[11] The court of appeals stated (App. 33a-36a) that its holding that subjective bad faith is not required for a finding of fraud upon the court

Accordingly, because it had concluded that the attorneys had acted recklessly, the court entered an order vacating the judgment in the extradition proceedings "on the ground that the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court." *Id.* at 42a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a court may exercise its power to overturn a judgment for "fraud upon the court," as described in the last clause of Fed. R. Civ. P. 60(b), even when a party acted in "good faith." Applying its holding that "subjective intent to commit frau[d] is not required," App. 33a, the court of appeals overturned a final judgment based on its dissatisfaction with good-faith actions taken by attorneys who represented the government in the litigation that led to the prior judgment. Both the court's understanding of its power to set aside a final judgment and its decision in this case are inconsistent with the decisions of other courts of appeals and the language of Rule 60(b). As every other court to interpret that Rule has held, the power to set aside civil judgments that are not challenged within a year is confined to instances in which a party has engaged in egregious and deliberate misconduct, such as bribery of a judge or fabrication of evidence. The decision below warrants review because of the circuit conflict it creates, the destabilizing effect of its holding on the reliability of civil judgments, and the impact of the decision on the extensive litigation involving respondent.

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was supported by this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court concluded that *Brady* applies in denaturalization and extradition cases in which the government relies on proof of criminal conduct (App. 34a), and pointed out that *Brady* applies "irrespective of the good faith or bad faith of the prosecution." *Ibid.* (quoting *Brady*, 373 U.S. at 86).

1. The court of appeals' observation that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court" (App. 33a) considerably understates the distance between the court's approach and the decisions of other courts exercising the "fraud upon the court" power. In fact, the standard adopted by the court of appeals in this case is inconsistent with standards articulated by the overwhelming majority of the courts of appeals. Recognizing the "deep-rooted policy in favor of the repose of judgments" (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)), the First, Fourth, Fifth, Eighth, and Ninth Circuits have held that the power described in Rule 60(b) to set aside a judgment for "fraud upon the court" cannot be exercised without proof of a "plan" or "scheme" to defraud.[12] That formu-

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[12] *E.g.*, *Aoude* v. *Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989) ("A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."); *Great Coastal Express, Inc.* v. *International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982) (requiring "deliberate scheme to directly subvert the judicial process"), cert. denied, 459 U.S. 1128 (1983); *Wilson* v. *Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.) (fraud upon the court "requires a showing of an unconscionable plan or scheme which is designed to improperly influence the court in its decision") (internal quotation marks omitted), cert. denied, 493 U.S. 977 (1989); *Browning* v. *Navarro*, 826 F.2d 335, 344 (5th Cir. 1987) (fraud upon the court doctrine provides that claimant "must demonstrate * * * a scheme or collusion that is designed to influence corruptly the proceedings, or to inhibit the ability of an adverse party to fully present his case or defense"); *Rozier* v. *Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978) ("[I]t is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision."); *Pfizer, Inc.* v. *International Rectifier Corp.* (*In re Coordi-*

lation, which the court of appeals expressly rejected, unmistakably requires intentional misconduct. Under that standard, the special master's findings that the government attorneys had a good-faith belief that they had met their discovery obligations and that they did not intentionally violate any rules or ethical obligations—findings that the court of appeals expressly declined to overturn (App. 25a)—would mandate rejection of respondent's efforts to have the extradition judgment set aside. Compare *United States* v. *Throckmorton*, 98 U.S. (8 Otto) 61, 69 (1878) (failure to come forward with information is not fraud upon the court in the absence of a "corrupt motive").

Similarly, the Second, Third, and Eleventh Circuits have adopted the following formulation suggested by Professor Moore:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases.

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nated Pretrial Proceedings in Antibiotic Antitrust Actions), 538 F.2d 180, 195 (8th Cir. 1976) (fraud upon the court is "a scheme to interfere with the judicial machinery"), cert. denied, 429 U.S. 1040 (1977); *Alexander* v. *Robertson*, 882 F.2d 421, 425 (9th Cir. 1989) (rejecting a claim of fraud where there was no evidence that the misconduct was "designed to improperly influence the court in its decision"); *Abatti* v. *C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988) ("Fraud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision.") (internal quotation marks omitted); see also *Hazel-Atlas Glass Co.*, 322 U.S. at 245 (fraud upon the court doctrine satisfied by proof of "a deliberately planned and carefully executed scheme to defraud" the court).

Senate Realty Corporation v. *CIR*, 511 F.2d 929, 931 (2d Cir. 1975) (quoting 7 James Wm. Moore et al., *Moore's Federal Practice* ¶ 60.33, at 515 (2d ed. 1974)); *Virgin Islands Housing Authority* v. *David*, 823 F.2d 764, 767 (3d Cir. 1987) (same)[13]; *SEC* v. *ESM Group, Inc.*, 835 F.2d 270, 273 (11th Cir.) (same), cert. denied, 486 U.S. 1055 (1988); see also *Gekas* v. *Pipin* (*In re Met-L-Wood Corporation*), 861 F.2d 1012, 1018 (7th Cir. 1988) ("[T]he fraud must involve corruption of the judicial process itself."), cert. denied, 490 U.S. 1006 (1989). As noted by the Second Circuit, the common element in cases in which a final judgment has been set aside for fraud upon the court is "evil intent, deceit, or collusion, [a] narrow definition [that] reflects the policy of putting an end to litigation." *Senate Realty Corporation*, 511 F.2d at 933.

2. Nor can the standard articulated by the court of appeals be reconciled with the structure and language of Rule 60(b). Even if the court of appeals were correct in rejecting the special master's conclusion that the government attorneys were not reckless,[14] the findings in this case cannot

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[13] To be sure, the Third Circuit suggested in *David* that something less than deliberate conduct could constitute fraud upon the court. See 823 F.2d at 767 (stating that a misrepresentation made with a "callous disregard" of the record can support a finding of fraud upon the court). But whatever the boundaries of that standard, it would not justify invalidation of the judgment in this case, in which the court of appeals expressly declined to disturb the special master's finding that the government attorneys "did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance." App. 25a (quoting *id.* at 263a).

[14] The court of appeals concluded that the government attorneys showed a reckless disregard for their obligations to disclose information to respondent under a standard that includes a situation in which an individual "does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." App. 26a. The court relied on a provision of the Restatement (Second) of

properly be construed to constitute "fraud upon the court" as described in Rule 60(b).

First, the structure of the Rule indicates that only the most egregious misconduct should be sufficient to invalidate a civil judgment that is not challenged within one year. Rule 60(b)(3) permits a judgment to be overturned for "fraud * * *, misrepresentation, or other misconduct of an adverse party," but only if "[t]he motion [is] made within a reasonable time, and * * * not more than one year after the judgment * * * was entered." Because the penultimate sentence of Rule 60(b) permits a judgment to be invalidated at any time for "fraud upon the court," the natural inference is that "fraud upon the court" is limited to a particularly egregious subset of the "fraud" described in Rule 60(b)(3); a broad interpretation extending the "fraud upon the court" provision to all cases of fraud would remove any force from the one-year time limitation on motions for relief under Rule 60(b)(3). See 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and*

Torts that articulates a standard for establishing reckless disregard of another individual's physical safety. See 2 Restatement (Second) of Torts § 500, at 587 (1965). That standard is substantially different from this Court's definition of "reckless disregard for the truth"—the equivalent of "actual malice" in a defamation action—as requiring a "high degree of awareness of * * * probable falsity" or "serious doubts as to the truth of [the statement]," *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 667 (1989) (internal quotation marks omitted); see also 1 *Model Penal Code* § 2.02(2)(c), at 226 (1985) ("A person acts recklessly * * * when he consciously disregards a substantial and unjustifiable risk * * *. The risk must be of such a nature and degree that * * * its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe."). Thus, even if recklessness can suffice to show fraud upon the court, the court of appeals erred in extending recklessness in this context to include conduct that a court considers to be, at worst, objectively unreasonable.

Procedure § 2870, at 253-254 (1973); cf. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44 (1991) (inherent power "to set aside fraudulently begotten judgments, * * * [b]ecause of [its] very potency, * * * must be exercised with restraint and discretion"); *Hazel-Atlas Glass Co.*, 322 U.S. at 244 ("courts of equity have been cautious in exercising their [inherent] power over * * * judgments").

Moreover, by concluding that it can overturn judgments solely because of errors counsel made in good faith, the court of appeals went further than extending "fraud upon the court" to the entire universe of cases involving "fraud" within the meaning of Rule 60(b). The definition articulated by the court of appeals extends the court's power to cases that cannot plausibly be included within any customary definition of fraud. As *Black's Law Dictionary* puts it, fraud is "synonymous" with "bad faith." *Black's Law Dictionary* 660 (6th ed. 1990). It is "an act of trickery or deceit esp. when involving misrepresentation." *Webster's Third New International Dictionary* 904 (1986). Similarly, Justice Joseph Story concluded that the "true definition" of fraud is "any cunning, deception, or artifice used to circumvent, cheat, or deceive another." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 185 (Jairus W. Perry 12th ed. 1877) (quoting a Roman jurist). Similarly, this Court has characterized it as "mean[ing] an intention to deceive." *Lord* v. *Goddard*, 54 U.S. (13 How.) 198, 211 (1851). The Court went on to explain in that case that a "party [who] honestly stated his own opinion, believing at the time that he stated the truth," could not be held liable for fraud, "although the representation turned out to be entirely untrue." *Ibid.*

None of those definitions properly can be applied to this case, given the undisturbed findings that the government attorneys acted in "good faith" and did not intentionally withhold information that they believed they were obli-

gated to disclose.[15] The worst that can be said of the conduct of the attorneys is that they failed to recognize the significance of the Fedorenko protocols.[16] The court of

[15] Contrary to the suggestion of the Sixth Circuit (App. 33a-36a), nothing in *Brady* v. *Maryland*, 373 U.S. 83 (1963), requires a contrary result in this case. *Brady* establishes only that the government violates a criminal defendant's right to due process when it fails to disclose evidence that is both material to guilt or punishment and favorable to the accused. 373 U.S. at 87. Although an unintentional *Brady* violation may provide a basis for attacking a criminal conviction, the prosecutor who unwittingly violates the *Brady* rule has not committed fraud upon the court. Moreover, for the reasons discussed below, we do not believe it plausibly can be said that the government withheld evidence that was material to the decision to extradite respondent.

[16] The court of appeals' reliance on the Polish Main Commission list and on the materials related to the Horn identification is entirely misplaced. First, because the government provided respondent with a copy of the Polish list in August 1982, more than three years before respondent's extradition (see note 10, *supra* (discussing panel's confusion about date list was produced)), the timing of that production cannot plausibly provide a basis for vacating the extradition judgment. In any event, it is difficult to see how the omission of respondent's name from an admittedly incomplete list of Treblinka guards (the list contained 43 of the "approximately 100" Trawniki guards at Treblinka (App. 29a)) could have affected the conclusion that the eyewitness identifications submitted by Israel established probable cause to extradite petitioner. Respondent did not make such an argument during the three-year period between his receipt of the list and his extradition.

The irrelevance of the materials related to Horn's identification is, if anything, even more clear: Because Israel did not submit SS officer Horn's identification of respondent in support of its extradition request, the government's failure to produce reports that could cast doubt on the validity of that identification could not possibly have misled the court of appeals into allowing respondent's extradition. Moreover, respondent's criticisms of that identification are not persuasive. After carefully reviewing the identification procedure, including the investigators' reports on which respondent relies, the three-judge Israeli trial court concluded that "it is difficult to find fault with this identification procedure." Gov't C.A. App. 564; see *id.* at 563-564 (discussing procedure); see also note 8, *supra* (discussing approval of identification by Supreme Court of Israel).

appeals upheld the master's finding that the two attorneys who read the protocols did not in fact consider them exculpatory or responsive to respondent's discovery requests in the denaturalization case.[17] Moreover, although the court of appeals stated without explanation that those protocols "name a man other than [respondent] as the notoriously cruel 'Ivan the Terrible' who ran the motors of the gas chambers," App. 9a, their relevance to the identity of the man known as Ivan the Terrible is quite ambiguous. As the special master commented after his detailed review of the extensive record, the Fedorenko protocols did not "refer to Ivan's notorious acts [and] provided nothing to connect the two names [Marchenko and Nikolay] with * * * Ivan the Terrible." *Id.* at 259a. Although the court

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[17] Even George Parker, the attorney most skeptical of the government's proof that respondent operated the Treblinka gas chambers, did not see anything in the protocols that undermined that conclusion. As the special master explained, "[t]he most striking aspect of [Parker's] memorandum [detailing his doubts] is its complete silence regarding the references [in the Fedorenko protocols] to a man named Marchenko at the gas chambers." App. 180a; see *id.* at 162a (discussing evidence that Parker "did not believe that * * * the [Fedorenko] protocols exculpated [respondent]"), 21a (court of appeals' agreement with special master that Parker "did not make the Marchenko connection").

Similarly, Attorney Norman Moscowitz in fact thought at first that the protocols were significantly inculpatory because the Marchenko name mentioned in the protocols resembled the name respondent offered in his immigration documents as his mother's maiden name, Martschenko. Far from recklessly disregarding the protocols, Moscowitz pursued that lead until he received Malagon's second statement, in which Malagon claimed to have known both a "Nikolay Marchenko" and an "Ivan Dem'yanyuk or Ivan Demedyuk" at Treblinka. Moscowitz then concluded that Marchenko's first name was Nikolay, and that respondent was the Ivan who operated the gas chambers. See App. 163a-167a (special master's discussion of Moscowitz's investigation of the protocols).

of appeals might have been correct in concluding, based on all of the evidence that is *now* available, that the protocols provide some support for respondent's claim, it is unfair to characterize the interpretation the government's attorneys placed on those documents as reckless. And it is prodigal to characterize their actions as constituting fraud upon the court, so as to justify invalidation of the judgment in the extradition proceeding.

The ease with which the court of appeals (having the benefit of new evidence revealed after the dissolution of the Soviet Union) was willing to second-guess the judgments made by the attorneys at the time of the litigation shows the accuracy of Judge Friendly's comment that it is "all too easy to fall into the error of condemning conduct with the aid afforded by the bright glare of hindsight," *Kupferman* v. *Consolidated Research and Manufacturing Corporation,* 459 F.2d 1072, 1080 (2d Cir. 1972). Although we do not in the least "minimiz[e] the unqualified duty of scrupulous candor that rests upon government counsel in all dealings with th[e c]ourt, to characterize [the conduct in this case] as amounting to fraud upon the [c]ourt is, to say the least, utterly extravagant," *Shotwell Manufacturing Co.* v. *United States,* 371 U.S. 341, 358 (1963).

3. The circuit conflict created by the decision below warrants resolution by this Court. By diluting the standards for fraud upon the court, the court of appeals' decision undermines the traditional finality of civil judgments. As the frequent rejection of "fraud upon the court" claims by the courts of appeals demonstrates, a court's power to invalidate a judgment at any time is extremely attractive to litigants, and any broadening of that power can be expected to lead to a significant increase in litigation seeking to invalidate the final judgments of federal courts. Because the decision of the court of appeals introduces a geographic differential into the prospect of success in such litigation,

review by this Court is warranted to ensure that the civil judgments of federal courts have the same strength and finality throughout the country.

Nor does respondent's acquittal in Israel, following the extradition, deprive the decision below of continuing importance with respect to respondent. If left undisturbed, there is a significant likelihood that the decision below will hinder the government's efforts to remove respondent from the United States. Respondent's service as an SS guard at Trawniki—which, as the Israeli Supreme Court noted, has been substantially confirmed by new evidence, *Demjanjuk* v. *Israel,* slip op. 393, ¶¶ 458-459 (see Gov't C.A. Reh. App. C20-C21)—as well as his false statements concealing that service at the time he entered, rendered him subject to denaturalization even if he was not the man known as Ivan the Terrible. See *Fedorenko* v. *United States,* 449 U.S. 490 (1981); see also App. 266a (special master's explanation that new evidence does not "cast any substantial doubt" on the conclusion that respondent's conduct required denaturalization). The decision of the court of appeals, however, has called into question the validity of the existing judgment of denaturalization, and it thus may hinder the government's efforts to obtain an expeditious and definitive resolution of respondent's status.[18] If the judgment below

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[18] Shortly after the panel issued its opinion invalidating the extradition judgment, the government, of its own volition, filed a motion in the denaturalization case asking the district court to reaffirm the denaturalization judgment on the ground that respondent's service at Trawniki furnished an independent basis for his denaturalization. See Motion To Reopen Judgment (filed Dec. 30, 1993). Respondent, on the other hand, has argued that the Sixth Circuit's finding of fraud upon the court in the extradition proceeding ~~justifies required~~ REQUIRES vacating the denaturalization judgment and dismissal of the complaint with prejudice. See Def's Resp. to Plf's Reply in Supp. of Mot. To Reopen Judgment at 4 (filed Mar. 18, 1994).

becomes final, the government may be precluded in the proceedings involving respondent's denaturalization from challenging determinations made in the course of the decision below. Cf. *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 170-171 (1984) (applying collateral estoppel against the government); *Montana* v. *United States*, 440 U.S. 147, 155-162 (1979) (same). Accordingly, the judgment of the court of appeals continues to involve a live and very real controversy between the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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